No. 88-7351

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In The

Supreme Court of the United States

October Term, 1988

JEFFREY ALAN WALTON,

Petitioner,

vs.

STATE OF ARIZONA,

Respondent.

On Writ Of Certiorari To The
Arizona Supreme Court

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Does Arizona's death penalty statute violate the Sixth Amendment by denying a jury trial on aggravating circumstances necessary for the imposition of death?

2. Does Arizona's death penalty statute violate the Eighth and Fourteenth Amendments by requiring the trial court to impose the death penalty if it finds that the defendant has failed to prove the existence of mitigating evidence sufficient to call for leniency?

3. Has the Arizona Supreme Court sufficiently defined the "especially heinous, cruel or depraved" aggravating factor to satisfy the requirements of *Maynard v. Cartwright*?

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STATEMENT OF THE CASE

On March 2, 1986, petitioner asked Sherold Ramsey and Robert Hoover to help him rob an old drunk, tie him up, and leave him in the desert. The three first traveled to a swap meet in Tucson and eventually arrived at a bar to wait for a victim. (J.A. at 8-16.) Thomas Powell, a young Marine on leave, left the bar and headed toward his car. Hoover whistled to let petitioner know that someone was coming. Petitioner confronted Powell, cocked his gun, and ordered him to empty his pockets and place the contents on top of his car. Powell complied with petitioner's demands and then lay down on the ground. Powell was then ordered off the ground and petitioner gave Powell's car keys to Hoover so that Hoover could drive. (J.A. at 16-20.)

Petitioner put Powell in the back seat and Hoover drove Powell's vehicle. While driving out of town to the desert, petitioner and Hoover talked to Powell, asking him where he lived and if he had any more money. Powell said that he lived in the area, but that he did not have any more money, as he had given his mother money for his sister's rent. (J.A. at 20-22.) When they arrived at an area known as Gates Pass, Powell was ordered out of the car and forced to lay on the ground. Petitioner and Hoover then began arguing in Powell's presence about what to do with him. Eventually, Hoover stated he did not care what petitioner did with Powell, whereupon petitioner told Hoover and Ramsey to turn up the car radio. Petitioner took Powell out in the desert and shot

him in the head. (J.A. at 23-26.) Powell died several days later.[1]

Petitioner returned to Powell's vehicle and said to his accomplices, "that was loud," "it sounded like a rifle." The three then went to a restaurant and bought hamburgers with the money taken from Powell. When they returned to their trailer, petitioner told Ramsey and Hoover that he should have checked Powell for a pulse, but he was sure the victim was dead because he shot him in the head. Petitioner boasted that he never saw a "man pee his pants before." (J.A. at 26-31.) After finishing his hamburger, petitioner wiped the fingerprints off the car and parked the car in a bowling alley parking lot.

Later, petitioner, Hoover, and Ramsey went to David Bilodeau's house to find some dynamite to destroy the car. Petitioner told Bilodeau that he had shot someone from the armed services in the head and he needed some dynamite to get rid of the car. Petitioner stated that the shooting took place at Gates Pass and showed Bilodeau the gun. Bilodeau told petitioner that he did not have any dynamite, and petitioner left. Bilodeau then telephoned the police and informed them what had happened. On March 5, 1986, Hoover and Ramsey left Tucson in Powell's car and went to California. (J.A. at 32-36.)

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[1] The medical examiner determined that Powell died approximately 24 hours prior to his body being discovered, which was approximately 1 week after the shooting. (R.T. 1/25/87 at 93-95.) The gunshot wound to the head blinded Powell and ultimately caused Powell to die from dehydration, starvation, and pneumonia. (R.T. 1/26/87 at 237-42.)

On December 16, 1986, the jurors found petitioner guilty of first-degree murder. (J.A. at 44.) On January 26 and 27, 1987, the trial court conducted the sentencing hearing. At the conclusion of the evidence, the trial court stated that it found beyond "any doubt" that petitioner had fired the shot that resulted in the death of Thomas Powell. (J.A. at 56.) It found two aggravating circumstances – that the crime was committed in an extremely heinous, cruel or depraved manner, and for pecuniary gain. It determined that the mitigating circumstances did not call for leniency and, therefore, sentenced petitioner to death. (J.A. at 56-58.)

SUMMARY OF ARGUMENTS

Because aggravating circumstances are not elements of the offense, and are instead sentencing factors that apply only after the defendant has been convicted, the Sixth Amendment does not require that the state provide a jury trial on the "aggravating circumstances." While aggravating circumstances are required by the Eighth Amendment, they do not enjoy the same traditional due process protections afforded elements of the crime.

The Arizona sentencing procedure that requires a defendant to prove the existence of mitigation by a preponderance of the evidence does not violate due process as it does not lessen the state's burden to prove every element of the crime. Mitigating evidence is peculiarly within the knowledge of the defendant, and the state should not be required to disprove that the defendant is entitled to leniency.

The Arizona sentencing procedure that requires the sentencer to impose death if it determines there is insufficient mitigation to warrant leniency does not create a mandatory or presumptive death penalty. Arizona's sentencing procedure mandates that the trial court consider all relevant mitigating evidence. The statute requires the imposition of the death penalty only if the court determines that the proffered mitigation is insufficient in light of the aggravation proved. In requiring that the death penalty be imposed under these circumstances, Arizona has attempted to abolish freakish or arbitrary imposition of the death penalty.

Because the facts surrounding other Arizona death penalty cases are not before this Court, this Court cannot engage in a proportionality review of all Arizona cases dealing with facts arguably similar to petitioner's case. The only constitutional issues appropriately raised are (1) has Arizona sufficiently limited the definition of the circumstance of "especially heinous, cruel, or depraved"; and (2) as defined and limited, do the facts support the Arizona Supreme Court's action in determining that the circumstance exists in the instant case.

The Arizona Supreme Court has held that a killing is "cruel" when the victim consciously suffered mental anguish or physical pain prior to death. It has held that a killing is "heinous or depraved" when the defendant had an especially depraved mental state as reflected by his words or actions at or near the time of the murder. The defendant's actions must fall into one of the following categories to constitute depravity: (1) the defendant relished in or boasted about the murder; (2) the defendant inflicted gratuitous violence upon the victim above what

was necessary to complete the object of the crime; or (3) the defendant needlessly mutilated the victim. In determining if the defendant truly exhibited a depraved mental state, the court will also consider the helplessness of the victim and the senselessness of the crime. The Arizona Supreme Court's definition of this aggravating circumstance meets the constitutional requirements of *Maynard v. Cartwright* by adequately informing the sentencer what must be present to impose death. In the instant case, the victim's mental suffering clearly shows cruelty, and petitioner's boasting about the crime clearly establishes depravity.

ARGUMENTS

I.

ARIZONA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE SIXTH AMENDMENT BY DENYING A JURY TRIAL ON AGGRAVATING CIRCUMSTANCES NECESSARY FOR THE IMPOSITION OF DEATH.

Petitioner contends that the Arizona Death Penalty procedure is in violation of the Sixth Amendment of the United States Constitution because it does not provide for jury determination of the aggravating circumstances necessary to impose death. Respondent disagrees.

A. The law in Arizona.

Arizona Revised Statutes Annotated § 13-703(B) provides:

> [T]he judge who presided at the trial or before whom the guilty plea was entered . . . shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

The statute excludes the jury from considering the factual issues presented to the trial court in determining if the death penalty is appropriate. *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1976), *cert. denied*, 433 U.S. 915 (1977). Based on this Court's opinions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), the Arizona Supreme Court has consistently held that the statute does not deprive a criminal defendant of his constitutional right to a jury trial under the Sixth Amendment. *State v. Walton*, 769 P.2d 1017, 1031 (Ariz. 1989); *State v. Gillies*, 691 P.2d 655, 659 (Ariz. 1984), *cert. denied*, 470 U.S. 1059 (1985). The court expressed the purpose and advantage of the Arizona procedure:

> The death penalty is reserved only for the most egregious murderers. As such, a comparison must be made among individuals. In this regard, we believe that a trial judge is more experienced at sentencing than a jury and is therefore better able to impose similar sentences in analogous cases.

State v. Gillies, 691 P.2d at 659 (citing *Proffitt v. Florida*, 428 U.S. at 252).

B. This Court has specifically determined that the Sixth Amendment right to a jury trial does not extend to the determination of aggravating factors under a state's capital sentencing procedures.

Although this Court has stated that jury sentencing is desirable in capital cases, it held in *Proffitt v. Florida* that jury sentencing was not "constitutionally required" under the Eighth Amendment. 428 U.S. at 252. It noted that judicial sentencing appeared to further the goals of the Eighth Amendment by ensuring "even greater consistency in the imposition at the trial court level . . . [of] sentences similar to those imposed in analogous cases." *Id.*

In *Spaziano v. Florida*, the defendant made a Sixth Amendment challenge to Florida's non-jury capital sentencing procedure. After the defendant was convicted of first degree murder, the trial court convened a sentencing hearing before the same jury, a majority of which recommended against the imposition of death. 468 U.S. at 451. Notwithstanding the jury's recommendation, the trial court concluded that there existed sufficient aggravating circumstances to warrant a sentence of death. 468 U.S. at 451-52. On appeal, the Florida Supreme Court reversed the sentence based on error at the sentencing hearing. 468 U.S. at 452.

On remand, the trial court conducted a new sentencing procedure without a jury. 468 U.S. at 453. At the resentencing hearing, the state presented evidence not presented to the advisory jury in the original sentencing proceeding. *Id.* The trial court relied on this new evidence to find an additional aggravating circumstance not found previously, reaffirmed a prior aggravating circumstance,

and again imposed a sentence of death. *Id.* On appeal, the Florida Supreme Court affirmed the death penalty.

In this Court, Spaziano argued that the Florida capital sentencing procedure violated "the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment." 468 U.S. at 458. This Court rejected Spaziano's claims, stating:

> The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial.

468 U.S. at 459. This Court found that, despite the unique aspects involved in a capital sentencing proceeding, the issue to be resolved is the same as any other sentencing proceeding – "a determination of the appropriate punishment to be imposed on an individual." *Id.* To that end, "The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Id.* This Court concluded:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

468 U.S. at 464.

In *Hildwin v. Florida*, 109 S. Ct. 2055 (1989), this Court again considered Florida's non-jury capital sentencing procedure. The defendant there argued that the Sixth

Amendment required "a jury to specify the aggravating factors that permit the imposition of capital punishment." 109 S. Ct. at 2056. This Court recognized that *Spaziano* did not address the fact that the death penalty in Florida could only be imposed if the trial court found an aggravating circumstance, but held, however, that the "existence of an aggravating factor . . . is not an element of the offense 'but instead is a sentencing factor that comes into play only after the defendant has been found guilty.' " 109 S. Ct. at 2057 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986)). This Court concluded:

> [T]he requirement that the findings be made by a judge rather than the jury [does] not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." . . . Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.

Hildwin v. Florida, 109 S. Ct. at 2057 (citing *McMillan v. Pennsylvania*, 477 U.S. at 93).

C. Petitioner's contentions why this Court's holdings should not apply to Arizona's non-jury capital sentencing procedure are meritless.

Petitioner argues that *Proffitt*, *Spaziano*, and *Hildwin* are not controlling because (1) there are "significant" differences between Florida's and Arizona's sentencing procedures; and (2) under the analysis of *McMillan*, Arizona's aggravating factors are elements of capital murder.

1. There is no substantive difference between Arizona's and Florida's capital sentencing procedures.

Petitioner asserts that Arizona's sentencing procedure differs from Florida's in two significant aspects: (1) Florida provides for jury recommendation even though the ultimate determination is for the trial court, and (2) the aggravating factors play a different role in the two sentencing schemes. (Petitioner's brief at 24.) The argument that the aggravating factors play a different role within the two sentencing schemes is wholly without merit. Florida Statutes Annotated § 921.141(3)(a) requires the trial court to find the existence or non-existence of the aggravating factors listed in § 921.141(5). If the trial court does not find any of the listed aggravating factors, "the court shall impose a sentence of life imprisonment." Fla. Stat. Ann. § 921.141(3); *Barclay v. Florida*, 463 U.S. 939, 954 (1983). Under the capital sentencing laws of most states, the sentencing body is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. *Lowenfield v. Phelps*, 108 S. Ct. 546, 554 (1988) (citing *Gregg v. Georgia*, 428 U.S. 153, 162-64 (1976), and *Proffitt v. Florida*, 428 U.S. at 247-250)). Requiring the sentencing body to find aggravating circumstances narrows the class of persons eligible for the death penalty according to an objective legislative definition. *Zant v. Stephens*, 462 U.S. 862, 878 (1983). Arizona's aggravating circumstances are in that regard no different from Florida's or from those of any other state that has an aggravation/mitigation system. (See Appendix A.)

Petitioner's assertion that Florida's sentencing system is significantly different than Arizona's because it

provides for an advisory jury recommendation, appears to be a distinction without difference. In *Spaziano*, this Court reviewed a death sentence that had been reimposed without a jury recommendation. 468 U.S. at 452-454. At the original sentencing hearing, the jury recommended life. 468 U.S. at 451-52. At the resentencing, the state presented evidence concerning, and the trial court found, an aggravating circumstance that was not presented to the original jury. 468 U.S. at 453. This Court found that the Florida procedure did not violate the Sixth, Eighth, or Fourteenth Amendments and affirmed the death sentence. 468 U.S. at 464. If the Sixth, Eighth, and Fourteenth Amendments do not prohibit a judge from re-imposing the death penalty over a jury's original recommendation of life, based on new evidence presented in a proceeding without the jury, Arizona's sentencing scheme must also pass constitutional muster on this issue. *Hildwin v. Florida*, 109 S. Ct. at 2057.

2. Arizona's aggravating factors are not elements of a higher crime of capital murder, thereby necessitating a jury determination of the elements of the crime.

Petitioner claims that Arizona's aggravating circumstances are elements of a higher crime of "capital" murder, thereby invoking the Sixth Amendment right to a jury trial on these findings. *Adamson v. Ricketts*, 865 F.2d 1011, 1026 (9th Cir. 1988), *cert. pending*, *Ricketts v. Adamson*, No. 88-1553.[2] This Court specifically rejected a similar argument in *Hildwin v. Florida*, stating:

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[2] *But cf. Ford v. Strickland*, 696 F.2d 804, 817-18 (11th Cir.), *cert. denied*, 464 U.S. 865 (1983) (aggravating factors under Florida system are not elements of capital murder).

> [A]n aggravating factor . . . is not an element of the offense but instead "a sentencing factor that comes into play only after the defendant has been found guilty."

109 S. Ct. at 2057 (citing *McMillan v. Pennsylvania*, 477 U.S. at 86).[3] This Court's holding in *Hildwin* is consistent with Eighth Amendment analysis in other cases. *Poland v. Arizona*, 476 U.S. 147 (1986); *Cabana v. Bullock*, 474 U.S. 376 (1986).

In *Poland v. Arizona*, 476 U.S. 147, the issue was whether the Double Jeopardy Clause barred further capital sentencing proceedings when, on appeal, the reviewing court found insufficient evidence to support the only aggravating factor on which the sentencer had relied. 476 U.S. at 148. This Court rejected Poland's fundamental premise that a capital sentencer's failure to find the particular aggravating circumstance alleged by the state constituted an "acquittal" of that circumstance for double jeopardy purposes. This Court held that double jeopardy protection only applied if the sentencing body, or the reviewing court, determined that the prosecution had not

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[3] Petitioner and the amici both assert that the issue whether the Sixth Amendment requires a jury determination of the existence of aggravating factors was not before the Court in *Hildwin*. In its opinion, however, this Court specifically identified the issue to be addressed:

> This case presents us once again with the question whether the Sixth Amendment requires *a jury to specify the aggravating factors that permit the imposition of capital punishment* in Florida.

109 S. Ct. at 2056 (emphasis added).

proved *"that the death penalty is appropriate."* 476 U.S. at 155 (emphasis in original). This Court stated:

> Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself "convict" a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not "acquit" a defendant (i.e., preclude the death penalty).

476 U.S. at 156 (citations omitted). Petitioner's assertion that an aggravating circumstance is an element of the higher offense of "capital murder" is in conflict with *Poland* because an acquittal on an element of the offense would bar subsequent prosecution. *Ashe v. Swenson*, 397 U.S. 436 (1970). Aggravating factors are not elements of the offense, but are instead sentencing factors that come into play only after the defendant has been found guilty. *Hildwin v. Florida*, 109 S. Ct. at 2057.

The holding in *Hildwin* is also supported by this Court's decision in *Cabana v. Bullock*, 474 U.S. 376. There this Court was asked to determine if a capital defendant was entitled to a jury trial on the findings required by *Enmund v. Florida*, 458 U.S. 782 (1982). *Enmund* held that the principles of proportionality embodied in the Eighth Amendment barred imposition of the death penalty upon a class of persons who did not themselves kill, attempt to kill, or intend to kill. 474 U.S. at 385. While the "Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital

murder that must be found by the jury." 474 U.S. at 385 n.3. The procedures required under *Enmund*, like the procedures required under *Furman v. Georgia*, 408 U.S. 238 (1972), are based on the principles contained in the Eighth Amendment. *Enmund v. Florida*, 458 U.S. at 810 n.19 (O'Connor, J. dissenting); *Gregg v. Georgia*, 428 U.S. at 189. While these procedures may be mandated by the principles underlying the Eighth Amendment, this Court has steadfastly refused to grant these procedures the same constitutional stature as elements of an offense, thereby invoking the jury trial right under the Sixth Amendment or double jeopardy protection. *Hildwin v. Florida*, 109 S. Ct. at 2057; *Poland v. Arizona*, 476 U.S. at 156; *Cabana v. Bullock*, 474 U.S. at 386.

Finally, petitioner argues, based on *McMillan*, that the Arizona capital sentencing procedure has created an offense of "capital murder" because the finding of an aggravating factor "ups the ante." *McMillan v. Pennsylvania*, 477 U.S. at 89. Capital punishment has, however, been within the range of punishment for a first-degree murderer in Arizona since statehood.[4] The Arizona legislature adopted the present aggravation/mitigation system from the Model Penal Code § 210.6 (Proposed Official Draft, 1962) in response to this Court's decision in *Furman*. *State v. Gretzler*, 659 P.2d 1, 12-13 (Ariz.), *cert. denied*, 461 U.S. 971 (1983). The Arizona Supreme Court has

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[4] *See* Ariz. Rev. Stat. Ann. §§ 13-453 and -454 (repealed Oct. 1, 1978); Ariz. Code Ann. §§ 43-2903 and 44-1814 (1939); Ariz. Rev. Code Ann. §§ 4585 and 5050 (1928); Ariz. Pen. Code § 1046 (1913); Ariz. Pen. Code § 933 (1901).

specifically rejected the argument that the present sentencing system creates an aggravated or capital murder class of homicide in Arizona, and found instead that the procedure "merely sets forth guidelines for the determination of punishment after one is convicted of first degree murder." *State v. Blazak*, 560 P.2d 54, 61 (Ariz. 1977). While Arizona's capital sentencing procedures offer criminal defendants some of the protection traditionally afforded *elements of a crime* (i.e., proof beyond a reasonable doubt with evidence admissible only in accordance with the rules of evidence), the legislative intent was only to comply with this Court's procedural requirements under the Eighth Amendment and not to create a substantive offense of capital murder. *Id. McMillan* does not transform "aggravating factors" into "elements" of a higher offense. *Hildwin v. Florida*, 109 S. Ct. at 2057.

II.

THE ARIZONA DEATH PENALTY STATUTE DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS BY REQUIRING THE TRIAL COURT TO IMPOSE THE DEATH PENALTY IF IT FINDS THAT THE DEFENDANT HAS FAILED TO PROVE THE EXISTENCE OF MITIGATING EVIDENCE SUFFICIENT TO CALL FOR LENIENCY.

Petitioner asserts that the Arizona death penalty statute violates due process by: (1) requiring a criminal defendant to prove the existence of mitigation by a preponderance of the evidence; and (2) creating a statutory presumptive or mandatory death penalty. Respondent disagrees.

A. Arizona's requirement that the defendant prove the existence of mitigation by a preponderance of the evidence does not violate the constitutional guarantees of due process.

1. The law in Arizona.

The relevant portion of Arizona Revised Statutes Annotated § 13-703(C) provides:

> The prosecution and the defendant shall be permitted to rebut any information received at the [sentencing] hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F [aggravation] and G [mitigation] of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

The Arizona Supreme Court has interpreted the statute to mean that the trial court acts "first as the fact finder" at the sentencing hearing. *State v. Leslie*, 708 P.2d 719, 730 (Ariz. 1985). The trial court must first consider whether the state has proven beyond a reasonable doubt facts supporting any of the statutorily-defined aggravating factors. *Id.* The trial court must then consider whether the defendant has shown the existence of mitigating circumstances by a preponderance of the evidence. *Id.* Mitigating circumstances are defined as any facts "relevant in determining whether to impose a sentence less than death." Ariz. Rev. Stat. Ann. § 13-703(G); *State v. Leslie*, 708 P.2d at 730. *"After the trial court has made these findings*

of fact, it then engages in a balancing test in which it determines whether the mitigating factors are sufficiently substantial to call for leniency." *State v. Leslie*, 708 P.2d at 730 (emphasis added). The reason for the evidentiary standard is that "[f]acts which would tend to show mitigation are peculiarly within the knowledge of [the] defendant." *State v. Smith*, 610 P.2d 46, 50 (Ariz. 1980). Therefore, to require the state to negate every possible mitigating circumstance would place an impossible burden on the prosecution. *State v. Watson*, 586 P.2d 1253, 1259 (Ariz. 1978), *cert. denied*, 440 U.S. 924 (1979).

In making its factual determinations, the trial court is to place on the record a list of all factors considered by the court in mitigation. *State v. Leslie*, 708 P.2d at 731. If the trial court rejects mitigating evidence, it must explain its reasons for doing so. *Id.* The Arizona Supreme Court requires this statement on the record to enable the reviewing court to determine whether the trial court has "considered" all mitigating facts prior to imposing sentence. *Id.*

2. Petitioner's right to due process of law is not offended by the Arizona requirement that facts in mitigation be proved by a preponderance of the evidence.

The sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The fact that due process applies to the sentencing proceeding does not, however, implicate the entire panoply of criminal trial procedural rights:

> Once it is determined that due process applies, the question remains what process is due . . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands . . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

430 U.S. at 358 n.9. (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). This Court has held that not all due process rights apply in capital sentencing. *Hildwin v. Florida*, 104 L. Ed. 2d at 732 (no right to a jury trial on facts supporting imposition of death penalty); *Poland v. Arizona*, 476 U.S. 147 (no right to double jeopardy protection on finding of aggravating circumstance); *Spaziano v. Florida*, 468 U.S. 447 (no right to jury sentencing); *Williams v. New York*, 337 U.S. 241 (1949) (confrontation clause does not apply in capital sentencing). This Court has found other procedural rights in capital sentencing proceedings to require due process safeguards. *Estelle v. Smith*, 451 U.S. 454 (1981) (Fifth Amendment right against self-incrimination and Sixth Amendment right to an attorney applicable to procedures used to secure evidence for sentencing); *Gardner v. Florida*, 430 U.S. 349 (due process violated when sentence may be based on facts not disclosed to the defendant).

This Court has yet to determine whether imposing an evidentiary burden on a defendant to prove the existence of mitigation violates due process.[5] This Court has,

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[5] A similar issue was raised in *Lockett v. Ohio*, 438 U.S. 586, 609 n.16 (1978). The Court never reached the issue. *Id.* This Court was again presented with this issue in *McKoy v. North Carolina*, No. 88-5909. However, at oral argument counsel for

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however, sustained statutes under a due process challenge that required defendants to prove by a preponderance of the evidence the affirmative defense of self-defense and extreme emotional disturbance. *Martin v. Ohio*, 480 U.S. 228 (1987); *Patterson v. New York*, 432 U.S. 197 (1977); *Rivera v. Delaware*, 429 U.S. 877 (1976). This Court has likewise affirmed the propriety of a statutorily-imposed burden of proof of beyond a reasonable doubt regarding a criminal defendant's claim of insanity. *Leland v. Oregon*, 343 U.S. 790 (1952). The thrust of these opinions is that the states maintain a preeminent role in preventing and dealing with crime. Further, this Court will only reluctantly disturb a state's definition of criminal conduct and "the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion." *Martin v. Ohio*, 107 S. Ct. at 1101; *accord*, *Patterson v. New York*, 432 U.S. at 201-02. So long as the state's method in allocating the respective burdens of proof does not lessen the state's burden to prove every element of the offense charged, placing a corresponding burden on a criminal defendant to prove an affirmative defense does not violate due process. *Martin v. Ohio*, 107 S. Ct. at 1101. In view of these cases, a statute that requires an already "convicted" defendant to prove mitigation by establishing the truth of what he asserts by a preponderance of the evidence does not violate the Constitution.

In reviewing a sentencing body's consideration of mitigation, this Court has indicated that a sentencer may

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McKoy conceded that the state could "require proof of a mitigating circumstance by a preponderance of the evidence." (Tr. O.A. at 9.)

"evaluate the evidence in mitigation and find it wanting as a matter of fact." Eddings v. Oklahoma, 455 U.S. 104, 113 (1982) (emphasis added). Because a sentencer may decline to find mitigation as a matter of fact, the question is then whether due process forbids the state from placing on the defendant the burden of producing and proving the existence of mitigating evidence.

Several federal courts have decided that due process does not prohibit the Government from placing on a defendant the burden of proving mitigation in the context of non-capital sentencing. *United States v. Burke*, 1989 U.S. App. Lexis 16350, at 19 n.10 (D.C. Cir. 1989); *United States v. McDowell*, 1989 U.S. App. Lexis 16146, at 16 (3rd Cir. 1989); *United States v. Urrego-Linares*, 879 F.2d 1234, 1238-39 (4th Cir.), *cert. denied*, 108 S. Ct. 350 (1989); *United States v. Wilson*, 884 F.2d 1355 (11th Cir. 1989); *see also Lockett v. Ohio*, 438 U.S. at 633 (Rehnquist, J. dissenting) (no constitutional infirmity in placing burden of persuasion on defendant to prove mitigation). In *Urrego-Linares*, the court noted that a defendant's conviction determines the sentencing range. 879 F.2d at 1239. If the Government seeks to enhance the sentencing range and potentially increase the ultimate penalty, the Government bears the burden of proof. *Id.* If the defendant advances a mitigating factor that, if accepted by the court, would lower the sentencing range and potentially reduce the ultimate penalty, "the defendant should bear the burden of proof to establish the mitigating factor(s) by a preponderance." *Id.* The court concluded:

> A defendant must be afforded an opportunity to contest assertions by the government that are designed to enhance his sentence, and to offer evidence in support of factors that may warrant a reduced sentence. *However, neither concerns of procedural due process nor any other good reason suggest that a defendant should be able to put the burden on the government to prove that the defendant should not receive any particular mitigating adjustment.*

Id. (emphasis added, citations omitted). For capital sentencing, the United States Congress has adopted a procedure similar to that used in Arizona. 21 U.S.C. § 848(j) (the Government must prove aggravation beyond a reasonable doubt, the defendant must prove mitigation "by a preponderance of the evidence").

The Arizona procedure meets the criteria set forth in *Urrego-Linares*. The defendant in Arizona is afforded the opportunity to contest the evidence the state presents to enhance (aggravate) his penalty. Ariz. Rev. Stat. Ann. § 13-703(C) ("the defendant shall be permitted to rebut any information received . . . and shall be given fair opportunity to present argument as to the adequacy of the information."). The defendant is allowed to present *any* evidence to substantiate his claim of mitigation and in so doing is not limited by trial evidentiary standards. Ariz. Rev. Stat. Ann. § 13-703(C) ("Any information relevant to any mitigating circumstances . . . may be presented . . . regardless of its admissibility under the rules governing admission of evidence at criminal trials."). "[N]either concerns of procedural due process nor any other good reason suggest" that the burden to disprove that mitigation exists should be placed on the state. *United States v. Urrego-Linares*, 879 F.2d at 1239; *accord*, *State v. Smith*, 610 P.2d at 50; *State v. Watson*, 586 P.2d at 1259.

Petitioner attempts to bring Arizona's evidentiary burden within this Court's decisions in *Lockett*, *Eddings*, and *Mills v. Maryland*, 108 S. Ct. 1860 (1988). *Lockett* and *Eddings* are clearly not applicable since the Arizona sentencing procedure requires the sentencer to consider all

relevant evidence to determine whether to "impose a sentence less than death." Ariz. Rev. Stat. Ann. § 13-703(G). Furthermore, as discussed below, there is nothing in the record that would indicate that the trial court did not follow the law. *Cf. Eddings v. Oklahoma*, 455 U.S. at 115 n.10 (sentencer may not exclude relevant mitigating evidence as a matter of law by refusing to listen). The Maryland sentencing procedure discussed in *Mills* is also distinguishable from that used in Arizona. In *Mills*, the jurors were instructed first to determine whether the state had proved the existence of aggravating circumstances beyond a reasonable doubt. If the jurors found aggravation, they then determined if the defendant had proved by a preponderance of the evidence the existence of mitigating circumstances. 108 S. Ct. at 1870-71. The judge's instruction to the jurors indicated that, if the jurors did not unanimously find an aggravating circumstance, the jurors were required to mark "no" by the listed circumstance. 108 S. Ct. at 1867. The trial court did not explain to the jurors, however, that in determining the existence of mitigation, if one or more of the jurors, but not all, did not find that the circumstance existed, the jury was not obligated to mark "no" by the listed circumstance. *Id.* Justice Blackmun, writing for the plurality, found that the procedure could preclude the jurors from considering:

> *[A]s a mitigating factor*, an aspect of a defendant's character or record or a circumstance of the offense that the defendant proffered as a basis for a sentence less than death, if even a single juror adhered to the view that such a factor should not be so considered.

108 S. Ct. at 1868 (citation omitted, emphasis in original). While the Court held that the Maryland procedure violated due process guarantees, the opinion indicated that

the perceived flaw was inapplicable to judicial sentencings. 108 S. Ct. at 1865 n.5. The perceived error in *Mills* would not affect judicial sentencing because the trial court is certainly capable of determining the factual existence of mitigation. *Eddings v. Oklahoma*, 455 U.S. at 113. If the trial court determines that the claimed mitigation does not exist, the trial court may properly refuse to consider it. *See California v. Brown*, 479 U.S. 538 (1987).

Petitioner argues, however, that the trial court under the Arizona system is precluded from considering facts that do not meet the evidentiary standard, although such facts may cause the trial court to have reservations about the death penalty. *Adamson v. Ricketts*, 865 F.2d at 1041. This is not a correct interpretation of the Arizona sentencing procedure. The Arizona sentencing procedure involves two steps. The first step requires the trial court to determine what facts exist. *State v. Leslie*, 708 P.2d at 730. Arizona requires that the defendant prove by a preponderance of the evidence the *existence* of what he asserts in this phase of the sentencing procedure. *State v. Leslie*, 708 P.2d at 730; *State v. Harding*, 670 P.2d 383, 397 (Ariz. 1983), *cert. denied*, 465 U.S. 1013 (1984); *State v. Greenawalt*, 624 P.2d 828, 851 (Ariz.), *cert. denied*, 454 U.S. 882 (1981). The preponderance standard[6] is the bare

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[6] Justice Harlan succinctly explained the purpose of an evidentiary standard in his concurring opinion in *In re Winship*:

> [I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can

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minimum standard in Arizona and is met by convincing the trier-of-fact that the claim asserted is "probably true." C. McCormick, *Law of Evidence* § 339, at 956 (3rd ed. E. Cleary 1984); *State v. King*, 763 P.2d 239, 242 (Ariz. 1988).

In *Adamson v. Ricketts*, the Ninth Circuit conceded that Arizona may require the defendant to produce mitigation, but objected to the preponderance standard. 865 F.2d at 1039-44. To hold the defendant to anything less than a preponderance standard would mean that the trial court would have to accept anything the defendant said as true, even if the trial court found the statement to be "blatant perjury." *State v. James*, 685 P.2d 1293, 1300 (Ariz.), *cert. denied*, 469 U.S. 990 (1984);[7] *accord*, *Barclay v. Florida*, 463 U.S. at 971-72 (trial court need not rely on

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> acquire is a belief of what *probably* happened. The intensity of this belief – the degree to which a factfinder is convinced that a given act actually occurred – can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

397 U.S. 358, 370 (1970) (Harlan, J. concurring) (emphasis in original).

[7] *See also State v. Wallace*, 728 P.2d 232, 239 (Ariz. 1986), *cert. denied*, 483 U.S. 1011 (1987) (defendant's claim of intoxication refuted by evidence in the record); *State v. Correll*, 715 P.2d 721, 735 (Ariz. 1986) (defendant's claim of past psychological problems not supported by the record); *State v. Martinez-Villareal*, 702 P.2d 670, 679 (Ariz. 1985), *cert. denied*, 474 U.S. 975 (defendant's claim of "unwilling participant" refuted by the evidence); *State v. Poland*, 698 P.2d 207, 210 (Ariz.), *cert. granted*, 474 U.S. 816 (1985) (defendant's claim of good reputation not proved given his admission at trial that he engaged in numerous criminal activities).

claim of no prior criminal record when presentence report demonstrates numerous convictions) (Stevens, J. concurring). While respondent agrees that the trial court must consider any *fact* constituting relevant mitigation, it may consider such evidence and determine it wanting as a matter of fact. *Eddings v. Oklahoma*, 455 U.S. at 113. Requiring a defendant to prove that the claimed mitigation is probably true is not violative of due process. *United States v. Urrego-Linares*, 879 F.2d at 1239.

During the next phase of the Arizona sentencing hearing, the trial court must determine the weight to be given the aggravating and mitigating facts it has found to exist. *State v. Gretzler*, 659 P.2d at 13. Even where the defendant proves certain facts exist, the sentencer does not have to agree that they constitute mitigation. *Raulerson v. Wainwright*, 732 F.2d 803, 807 (11th Cir.), *cert. denied*, 469 U.S. 966 (1984); *State v. Correll*, 715 P.2d at 735 (defendant's cooperation in preparing presentence report is not a mitigating factor); *State v. Smith*, 707 P.2d 289, 299 (1985) (defendant's age (30) is not a mitigating factor); *accord*, *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986) (how many times defendant showers is not relevant mitigation). After balancing the factors, the trial court determines what the appropriate penalty should be, based on the evidence. *State v. Gretzler*, 659 P.2d at 13.

If the trial court determines that the defendant has failed to prove the existence of the facts offered in mitigation, the trial court is, in essence, finding that the assertions are unbelievable and, hence, not worthy of further consideration. To require the trial court to nonetheless assign mitigating weight to the mere assertion is a concept unsupported by anything in Eighth Amendment jurisprudence.

3. The trial court properly considered all mitigating evidence proffered by petitioner.

After petitioner's conviction, petitioner filed a presentence memorandum wherein he challenged the legal sufficiency and the weight to be given to the state's noticed aggravating factors, and proffered a list of mitigating circumstances to be considered by the trial court. (R. 477-85.)[8] At the sentencing hearing, petitioner presented psychiatric evidence to support his claim that he suffered from drug abuse at the time of the murder, thereby impairing his judgment. (R.T. 1/27/87 at 265.) On cross-examination, petitioner's expert conceded that petitioner did not suffer "any thought disorder" and that petitioner knew the nature and quality of his acts at the time of the offense. (R.T. 1/27/87 at 271.) The expert also testified that his conclusion about petitioner's drug addiction was based entirely on statements made by petitioner that could be false. (R.T. 1/27/89 at 272.) The expert concluded as follows:

> Q [prosecuting attorney]. Would you agree with me based upon your evaluation and the records presented to you that Mr. Walton is certainly not the kind of individual that you would want to see in the community or on the streets given the type of behavior he has engaged in?
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> A [psychiatric expert]. I think he has some very maladapted behavior and that he's unfortunately become sort of an institutionalized

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[8] Petitioner asked the court to consider the following mitigating factors: (1) mental impairment based on petitioner's substance abuse; (2) petitioner's claim that his codefendant (Hoover) actually killed the victim; (3) petitioner's age (20); (4) petitioner did not attempt to flee; and (5) proportionality of a death sentence in light of the fact that one codefendant (Ramsey) received only 28 years. (R. 483-85.)

> person, his ability to function outside an institution does not obviously work very well.
>
> Q. That would cause you a great deal of concern?
>
> A. I would say that he certainly presents difficulties to the community, yes.

(R.T. 1/27/87 at 274-75.)

The presentence report indicated that petitioner, although only 20 years old, already had prior felony convictions for armed robbery, aggravated robbery, attempted armed robbery, attempted aggravated robbery, and escape. (Presentence Report filed 1/27/87 at 2.) In addition to these felony convictions, petitioner had numerous juvenile adjudications. (*Id.*) Petitioner admitted that he spent a majority of his time while incarcerated in "deadlock" due to being a disciplinary problem. (*Id.* at 7.) While petitioner was in custody for the instant charge, he was indicted for threatening a correctional officer with a towel hook. (*Id.*)

At the conclusion of the evidentiary portion of the sentencing hearing, petitioner reargued the mitigating factors previously argued in the memorandum. (J.A. at 48-50.) The trial court found as follows:

> The Court finds beyond a reasonable doubt, Mr. Walton, that you were the person that took the deceased, Mr. Powell, into the desert, put a gun to his head which resulted in his subsequent death.
>
> The Court not only finds that beyond a reasonable doubt but beyond any doubt in this Court's mind.
>
> The Court further has considered the following mitigating circumstances: your capacity to appreciate the wrongfulness of your conduct or to conform your conduct to the requirements of the law may have been significantly impaired

but not so impaired as to constitute a defense to prosecution.

The Court has also considered your age; the Court's also considered all other mitigating factors set forth in the pre-sentence report and all other mitigating circumstances as stated by your attorney on the record this date.

(J.A. at 56-57.) Of the five mitigating factors proffered by petitioner, the trial court rejected (and therefore did not assign mitigating weight) only petitioner's claim that codefendant Hoover shot the victim. The trial court found the remaining mitigating evidence insufficient to outweigh the aggravating evidence presented. Because the evidence was overwhelming that it was petitioner who shot the victim, there was no error in the trial court's factual determinations.

B. The Arizona statute properly requires that the death penalty be imposed if the trial court determines that the mitigating circumstances are insufficiently substantial to call for leniency.

Petitioner contends that the Arizona death penalty statute's requirement that the trial court impose a sentence of death if it concludes that the aggravating circumstances outweigh the mitigating circumstances creates a mandatory or presumptive sentencing scheme and is thus unconstitutional. Respondent disagrees.

1. The law in Arizona.

Arizona Revised Statutes Annotated § 13-703(E) provides:

> In determining whether to impose a sentence of death or life imprisonment . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F [aggravation] and G [mitigation] of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Arizona Revised Statutes Annotated § 13-703(F) provides a specific list of aggravating circumstances to be considered in capital sentencing decisions, and further requires the trial court to consider any relevant mitigating evidence in determining whether to impose a death sentence. *State v. Gretzler*, 659 P.2d at 12-13. Where none of the statutory aggravating circumstances is found, the statute prohibits the death penalty. *Id.*; *State v. Madsen*, 609 P.2d 1046, 1053 (Ariz.), *cert. denied*, 449 U.S. 873 (1980). Where one or more statutory aggravating circumstances is found, and no mitigation exists, the statute requires the death penalty to be imposed. *State v. Jordan*, 672 P.2d 169, 173 (Ariz. 1983); *State v. Gretzler*, 659 P.2d at 13. Where both aggravating and mitigating circumstances are found in a given case, however, the trial court must determine whether the mitigating circumstances are "sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E); *State v. Gretzler*, 659 P.2d at 13.

The balancing procedure is not a mechanistic determination of the *number* of aggravating and mitigating circumstances presented, but instead requires the trial court to determine and compare the "gravity" of the circumstances found. *State v. Gretzler*, 659 P.2d at 13.[9] In

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[9] In his brief, petitioner implies that the trial court does not determine the weight to be given an aggravating factor. (Petitioner's brief at 32 n.26, 36.) This is clearly not the law. In *State v. Romanosky*, 1989 Ariz. Lexis 183 (1989), the Arizona Supreme Court held that a defendant may produce extrinsic

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arriving at a just result, the trial court must "carefully consider all the 'compassionate or mitigating factors stemming from the diverse frailties of humankind.' " 659 P.2d at 13 (citing *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

As an additional safeguard, the Arizona Supreme Court conducts a de novo review of the trial court's determinations. *State v. Rockwell*, 775 P.2d 1069, 1079 (Ariz. 1989); *State v. Gretzler*, 659 P.2d at 14; *State v. Richmond*, 560 P.2d at 51. On mandatory appeal, the Arizona Supreme Court does not review the record merely to determine if the trial court "properly imposed the death penalty," it determines whether *it* believes "that the death penalty should be imposed." *State v. Rockwell*, 775 P.2d at 1080 (citing *State v. Watson*, 628 P.2d at 946). When the Arizona Supreme Court has doubt whether the death penalty should have been imposed, it "will resolve that doubt in favor of a life sentence." *State v. Rockwell*, 775 P.2d at 1080; *State v. Marlow*, 1989 Ariz. Lexis 192, at 21

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evidence surrounding the nature and circumstances of a prior violent felony conviction to mitigate the weight to be afforded the conviction as an aggravating circumstance. 1989 Ariz. Lexis 183, at 32-33 n.9. The state may not use extrinsic evidence to prove that the prior conviction was "violent," as the state is limited to the statutory definition of the offense to establish the aggravating circumstance. *Id.* If the statute defines the prior conviction as violent, however, the state may proffer extrinsic evidence to give additional "weight" to the aggravating circumstance. *State v. Gillies*, 662 P.2d 1007, 1018 (Ariz. 1983); *State v. Greenawalt*, 624 P.2d at 849. *See also State v. Brookover*, 601 P.2d 1322, 1326 (Ariz. 1979) (trial court must "weigh" the respective factors in determining the appropriate punishment); *State v. Watson*, 586 P.2d at 1260 (defendant may offer evidence that minimum sentence was imposed on prior conviction to lessen its impact).

(1989) (citing *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982)). Thus, under the Arizona procedure, the death penalty "is then reserved for those who are above the norm of first-degree murderers or whose crimes are above the norm of first-degree murders, as the legislature intended." *State v. Beaty*, 762 P.2d 519, 534 (Ariz. 1988), *cert. denied*, 109 S. Ct. 3200 (1989).[10]

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[10] In his brief, petitioner takes bits and pieces of the Arizona Supreme Court's opinion in *Beaty* and argues that the Arizona statute takes away the trial court's sentencing discretion. (Petitioner's brief at 36-37.) A complete reading of *Beaty* shows just the opposite:

> The statute takes the human element out of the imposition of the death penalty and in doing so supports the constitutionality of the statute. Under the statute, a defendant will stand the same chance of receiving the death penalty from a judge who does not philosophically believe in the death penalty as from a judge who does. By taking the human factor out of the sentencing process the death penalty is then reserved for those who are above the norm of first-degree murderers or whose crimes are above the norm of first-degree murders, as the legislature intended.

762 P.2d at 534. The case clearly does not stand for the proposition that the trial court may not exercise its discretion in weighing and balancing the aggravating and mitigating circumstances. The statute merely precludes the trial court from imposing a life sentence based on its sentencing philosophy after it has determined that the aggravating circumstances outweigh the mitigation. *See State v. McMurtrey*, 726 P.2d 202, 204 (Ariz. 1986), *cert. denied*, 480 U.S. 911 (1987) (trial court would not have imposed death based on personal beliefs, however, defendant certainly qualified). If the statute provided otherwise, it would truly be arbitrary. *Cf. Witherspoon v. Illinois*, 391 U.S. 510 (1960) (state may exclude potential jurors if they cannot conscientiously impose the death penalty); *California v. Brown*, 479 U.S. 538 (imposition of death sentence should be based on only relevant circumstances).

2. The Arizona capital sentencing procedure does not create a presumptive or mandatory death sentence in violation of the Eighth Amendment.

In 1976, this Court upheld three "guided-discretion" statutes, emphasizing that those schemes appropriately narrowed the class of death penalty-eligible offenders, and permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and the individual defendant. *Gregg v. Georgia*, 428 U.S. at 197; *Proffitt v. Florida*, 428 U.S. at 251-52; *Jurek v. Texas*, 428 U.S. 262, 270-71 (1976). This Court declared two mandatory sentencing schemes unconstitutional, stressing that the systems were fatally flawed by their failure to permit presentation of mitigating circumstances for consideration by the sentencing authority. *Woodson v. North Carolina*, 428 U.S. at 303-05; *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976). Thus, these cases held that (1) the procedure must narrow the class of offenders eligible for the death penalty, and (2) "it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence." *Sumner v. Shuman*, 107 S. Ct. 2416, 2720 (1987); *Gregg v. Georgia*, 428 U.S. at 189 n.38. So long as the sentencing scheme meets these two requirements, it is constitutional.

The Arizona capital sentencing procedure is a proper application of these requirements. Arizona's procedure narrows the class of death penalty-eligible offenders and provides for consideration of all mitigating evidence, including evidence relating to the circumstances of the offense. *State v. Gretzler*, 659 P.2d at 13-14; *State v. Correll*, 715 P.2d at 735. Arizona requires the trial court to impose the death sentence only after the court determines that

the aggravating circumstances outweigh the mitigating circumstances. *State v. Gretzler*, 659 P.2d at 13. By requiring the trial court to consider all relevant evidence in mitigation, and then instructing the court to impose a sentence of death if the mitigating circumstances are not sufficiently substantial to call for leniency, Arizona's statute allows for the individual consideration required under *Lockett* and *Eddings*, and at the same time avoids the arbitrary imposition of death that this Court condemned in *Furman*.

Petitioner argues, however, that this provision of the statute is unconstitutional because it creates a "mandatory death penalty" or a "presumption" of death that precludes individualized sentencing based on the circumstances of the offense and the offender. *Adamson v. Ricketts*, 865 F.2d at 1041-42; *Jackson v. Dugger*, 837 F.2d 1469, 1474 (11th Cir.), *cert. denied*, 108 S. Ct. 2005 (1988).[11] The argument is an unwarranted extension of this Court's jurisprudence and would engraft a third requirement of "unbridled discretion" for sentencers.

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[11] The "presumption" of death found unconstitutional by the Eleventh Circuit in *Jackson v. Dugger* is clearly not applicable to the Arizona capital sentencing scheme. The Florida jury instruction at issue in *Jackson* stated, "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided." 837 F.2d at 1473. Arizona's sentencing system does not give any specific weight to any of the aggravating factors, and the trial court must determine the weight of the factors by the "gravity" shown. *State v. Gillies*, 662 P.2d at 1018; *State v. Gretzler*, 659 P.2d at 13; *State v. Romanosky*, 1989 Ariz. Lexis 183, at 32-33 n.9. The trial court's discretion is only controlled after the court weighs the circumstances presented and determines that the aggravation outweighs the mitigation. Unlike *Jackson*, in Arizona there is no "presumption" that, on balancing the circumstances, the trial court will arrive at any particular conclusion.

Contrary to petitioner's assertion that unbridled discretion is required under the Eighth Amendment, this Court has merely indicated that it will *tolerate* "unbridled discretion" once a sentencer has determined that a murderer has crossed the threshold of death penalty eligibility, and has considered all mitigating evidence:

> [T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that states cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.

Franklin v. Lynaugh, 108 S. Ct. 2320, 2331 (1988); *see also Lowenfield v. Phelps*, 108 S. Ct. at 555; *California v. Brown*, 479 U.S. at 541.[12] Understandably, Arizona, and other states, chose to channel the discretion of sentencers in considering the circumstances and determining the final penalty after this Court invalidated death penalty statutes in 1972 because the sentencing procedures then in effect created a substantial risk that the death penalty would be inflicted in an "arbitrary and capricious

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[12] In *California v. Brown*, this Court held that it was proper to instruct jurors not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling in deciding the sentence. This Court noted that neither Brown nor the California Supreme Court contended that such factors, unrelated to relevant mitigation, should play any role in the sentencing determination. 479 U.S. at 542. Because the Constitution permits the instruction given in *Brown*, the Constitution does not require that the sentencer be allowed to impose life capriciously when the defendant cannot produce relevant or substantial mitigation.

manner."[13] *Gregg v. Georgia*, 428 U.S. at 188. Channeling a sentencer's discretion serves the "useful purpose" of precluding consideration of extraneous emotional factors unrelated to the evidence. *See California v. Brown*, 479 U.S. at 543. Furthermore, it ensures that the death penalty will be imposed "with regularity," rather than "freakishly or rarely." *Proffitt v. Florida*, 428 U.S. at 260 (White, J. concurring); *Jurek v. Texas*, 428 U.S. at 278-79 (White, J. concurring). The channeling of a sentencer's discretion "minimize[s] the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. at 189. Such schemes promote the rational and predictable administration of death penalty laws. *California v. Brown*, 479 U.S. at 541. Standards for the consideration of all evidence provide a "meaningful basis for distinguishing the few cases in which the [death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 238 (White, J. concurring). They also foster reliability in further judicial review. *California v. Brown*, 479 U.S. at 543.

This Court has reviewed and affirmed sentencing schemes with guided discretion. In *Proffitt v. Florida*, this

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[13] *See, e.g., McKenzie v. Risley*, 842 F.2d 1525, 1543 (9th Cir.), *cert. denied*, 109 S. Ct. 250 (1988); *Campbell v. Kincheloe*, 829 F.2d 1453, 1466 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 380 (1988); *People v. Boyde*, 758 P.2d 25 (Cal. 1988), *cert. granted*, 109 S. Ct. 2447 (1989); *People v. Montgomery*, 494 N.E.2d 475, 482 (Ill. 1986), *cert. denied*, 479 U.S. 1101 (1987); *State v. Tichnell*, 509 A.2d 1179, 1999 (Md.), *cert. denied*, 479 U.S. 995 (1986); *State v. Coleman*, 605 P.2d 1000, 1016 (Mont. 1979), *cert. denied*, 446 U.S. 970 (1980); *State v. Ramseur*, 524 A.2d 188, 287 n.81 (N.J. 1987); *State v. Jenkins*, 473 N.E.2d 264, 280-281 (Ohio 1984), *cert. denied*, 472 U.S. 1032 (1985); *Commonwealth v. Blystone*, 549 A.2d 81 (Pa. 1988), *cert. granted*, 109 S. Ct. 1567 (1989); *State v. Dicks*, 615 S.W.2d 126, 131 (Tenn.), *cert. denied*, 454 U.S. 933 (1981); *State v. Jeffries*, 717 P.2d 722, 737 (Wash. 1986).

Court approved a statute that required imposition of the death penalty if the aggravating circumstances outweighed the mitigating circumstances. Florida had interpreted its statute as compelling a death judgment in the absence of mitigating circumstances. *Barclay v. Florida*, 463 U.S. at 961-62 (Stevens, J. concurring) (citing *Cooper v. State*, 336 So.2d 1133, 1142 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977)); *see also Woodson v. North Carolina*, 428 U.S. at 315 (Rehnquist, J. dissenting); *Roberts v. Louisiana*, 428 U.S. at 362 n.8 (White, J. dissenting). The concurrence in *Proffitt* praised the Florida statute because it "required" the sentencer to impose the death penalty if aggravating circumstances outweighed mitigating circumstances. *Proffitt v. Florida*, 428 U.S. at 260-61 (White, J. concurring). When this Court again approved Florida's statute in *Barclay v. Florida*, Florida still interpreted its statute as establishing a rebuttable "presumption" of death. *Barclay v. Florida*, 463 U.S. at 961-62 (Stevens, J. concurring) (citing *Williams v. State*, 386 So. 2d 538, 543 (Fla. 1980)).

This Court has likewise approved the Texas death penalty scheme, which required that the death sentence be imposed if the sentencer answered three questions about the defendant in the affirmative. This Court approved the statute because it narrowed the class of death penalty-eligible murderers and because it permitted the sentencer to consider all mitigating circumstances. *Jurek v. Texas*, 428 U.S. at 270-76. The concurrence in *Jurek* noted that the sentencer "must" impose the death penalty if it answered the questions affirmatively, and that the statute did "not extend to juries discretionary power to dispense mercy." 428 U.S. at 279 (White, J. concurring); *see also Woodson v. North Carolina*, 428 U.S. at 315 (Rehnquist, J. dissenting); *Roberts v. Louisiana*, 428 U.S. at 359 (White, J. concurring). In *Franklin v. Lynaugh*, the court

reaffirmed the constitutionality of Texas' death penalty scheme on the assumption that the statute permitted consideration of all mitigating evidence. 108 S. Ct. at 2330-32 (O'Connor, J. concurring); *accord*, *Penry v. Lynaugh*, 109 S. Ct. at 2947-51.

Arizona, like Florida and Texas, has chosen to provide guidance and direction to its sentencers. Nothing in this Court's precedents militates against that choice. Indeed, an analysis of this Court's decisions indicates that the Eighth Amendment encourages Arizona's choice of action.

In arguing that Arizona's sentencing procedure is unconstitutional, petitioner asks this Court to hold that a sentencing body should have "unbridled discretion" whether to impose a death sentence. To do so would mean that Eighth Amendment jurisprudence has come full circle since *Furman*. *See McGautha v. California*, 402 U.S. 183 (1971). Petitioner's position would preclude legitimate state efforts to direct and guide sentencers in a rational and equitable fashion, and should be rejected by this Court.

Petitioner also claims that the net effect of Arizona's "mandatory" capital sentencing scheme, coupled with the "broad" interpretation of the Arizona aggravating factors, is that the death penalty is mandated in almost all cases. Petitioner's assertion is not borne out by the application of the procedure. As of October 30, 1989, there were 709 inmates incarcerated in the Arizona Department of Corrections for "Murder" convictions. Ariz. Rev. Stat. Ann. §§ 13-1104 and -1105. (See Appendix B.) Of the 356 inmates convicted of murder in the first degree since October 1, 1978, only 66 have a death sentence. (*Id.*) Clearly, the end result of Arizona's sentencing procedure

is that Arizona now has a "meaningful basis for distinguishing the few cases in which the [death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. at 238 (White, J. concurring). Petitioner is one convicted murderer Arizona has constitutionally selected.

3. The trial court was not obligated to impose a sentence of death upon petitioner, and there is nothing in the record to suggest otherwise.

Finally, petitioner asserts that the trial court felt obligated to impose the death penalty under Arizona's "mechanistic" death penalty procedure. There is no factual foundation in the record to support petitioner's speculative claim. At the sentencing hearing, the trial court indicated that it had considered all of the mitigating evidence presented, but found "no mitigating circumstances sufficiently substantial to call for leniency." (J.A. at 57.) The trial court thereafter imposed death. (*Id.*) In the sentencing hearing for codefendant Hoover, however, the trial court did not impose death, but opted for a life sentence instead. The trial court exercised its discretion and found the aggravating circumstances in petitioner's case sufficiently substantial to warrant the imposition of death. There was no error.

III.

THE AGGRAVATING FACTOR OF "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED" HAS BEEN SUFFICIENTLY DEFINED TO SATISFY THE REQUIREMENTS OF *MAYNARD V. CARTWRIGHT*.

Petitioner contends that Arizona's aggravating circumstance of "especially heinous, cruel or depraved" is unconstitutionally vague on its face and as applied to

him. *Adamson v. Ricketts*, 865 F.2d at 1029-39. Respondent disagrees.

A. The scope of review by this Court.

A statute is vague and therefore in violation of the Eighth Amendment if it fails to adequately inform the sentencing body "what [it] must find to impose the death penalty." *Maynard v. Cartwright*, 108 S. Ct. 1853, 1858 (1988). Petitioner attempts to use *Maynard* as a vehicle to have this Court review all 61 Arizona cases analyzing the aggravating circumstance of "especially heinous, cruel or depraved" to determine if the Arizona Supreme Court has acted properly in applying the statute. *Maynard* cannot be read so broadly.

In *Maynard*, the trial court did not instruct the jury on what the terms "heinous," "atrocious," or "cruel" meant. The Tenth Circuit reviewed Oklahoma law to determine if the Oklahoma Court of Criminal Appeals had set forth a limiting interpretation of the statute, and concluded that the Oklahoma Court had refused to hold that any one factor must be present for a murder to satisfy the aggravating circumstance. *Cartwright v. Maynard*, 822 F.2d 1477, 1483, 1491 (10th Cir. 1987). The state did not take issue with the reading of Oklahoma law by the Tenth Circuit. *Maynard v. Cartwright*, 108 S. Ct. at 1857. This Court held that the failure of the Oklahoma court to define and limit these terms was in violation of the Eighth Amendment because it did not minimize the "risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858.

Maynard requires that the state must articulate a standard by which it evaluates such circumstances. 108 S. Ct. at 1859. *Maynard* does not authorize wholesale proportionality review of all state court decisions by a federal court to see if the federal court approves of the standard

chosen by the state court. This Court did not affirm the Tenth Circuit because it disagreed with a standard articulated by the Oklahoma court; it affirmed because Oklahoma had never clearly articulated a standard. In Arizona, however, the Arizona Supreme Court has set forth a very specific definition of "especially heinous, cruel or depraved" and what factors are necessary to support a finding. *State v. Gretzler*, 659 P.2d at 13; *State v. Correll*, 715 P.2d at 735. Furthermore, in Arizona, the trial court imposes the sentence; therefore, it is presumed the court knows and applies the law. Finally, the Arizona Supreme Court reviews each case de novo, as a trier-of-fact, to assure the correct application of the aggravating circumstance. *State v. Smith*, 638 P.2d 696, 700-01 (Ariz. 1982).

To determine if the Arizona limitation was misapplied in any one case would require that the record of that case be before the Court. *See Godfrey v. Georgia*, 446 U.S. 420 (1980) (Court reviews facts surrounding aggravating circumstance to determine if it supports finding by Georgia Supreme Court); *cf. Proffitt v. Florida*, 428 U.S. at 255 n.12 (Court reviews other cases to see if state court has abandoned limiting definition). The reasons for the Arizona Supreme Court's factual determinations in other cases are not of constitutional scope and are beyond this Court's ability to review. Because the only record before this Court is petitioner's, this Court may only properly determine if the statute as defined and limited by the Arizona Supreme Court is adequate on its face to inform a trial court what it "must do to impose the death penalty," *Maynard v. Cartwright*, 108 S. Ct. at 1858; and whether, as so defined, it was applied to petitioner so as not to render it unconstitutionally vague, *Godfrey v. Georgia*, 446 U.S. at 432.

In addressing the issue of misapplication, petitioner challenges for the first time the existence of the facts supporting the Arizona Supreme Court's finding of the aggravating factor, claiming that the facts do not show that the victim was scared prior to the shooting.[14] This Court said in *Barclay v. Florida*, 463 U.S. at 947, that federal review of the application of an aggravating circumstance was limited to whether the finding was so "unprincipled or arbitrary as to somehow violate the United States Constitution." The facts clearly support the decision of the Arizona Supreme Court and are not "unprincipled or arbitrary."

B. The law in Arizona.

The Arizona Supreme Court defined the terms "especially heinous, cruel or depraved" as follows:

> heinous: hatefully or shockingly evil: grossly bad.
>
> cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.
>
> depraved: marked by debasement, corruption, perversion or deterioration.

[14] Petitioner did not raise the issue whether the facts supported the Arizona Supreme Court's finding of the aggravating factor in the petition for certiorari. (Petition for Writ of Certiorari at 13-16.) Petitioner only argued that in other cases the court did not find the circumstance on facts arguably similar. (*Id.*) Petitioner likewise never contested the facts in the Arizona Supreme Court. (Opening Brief in Arizona Supreme Court at 39-45.) Petitioner merely argued that the facts presented did not legally constitute the aggravating circumstance. (*Id.*) These issues are therefore not properly before this Court. Rule 34.1, United States Supreme Court Rules. Respondent shall address the issue only to demonstrate that the Arizona Supreme Court did not commit "plain error." *Id.*

State v. Knapp, 562 P.2d 704, 716 (Ariz. 1977), *cert. denied*, 435 U.S. 908 (1978). It also stated that the legislature intended to include killings where additional circumstances "set the crime apart from the usual or the norm." *Id.* Recognizing that every murder in a certain sense may be characterized as heinous, cruel, or depraved, it required that the facts show it to be *especially* heinous, cruel, or depraved. *State v. Lujan*, 604 P.2d 629, 636 (Ariz. 1979).

Contrary to the implication proffered by petitioner, this was not the end of the court's defining, refining, and narrowing of the circumstance. By the time the Arizona Supreme Court handed down *State v. Gretzler* in 1983, it had reviewed a sufficient number of cases to crystallize the requirements to establish each prong of the circumstance. The court explained that "cruelty involves the pain and distress visited upon the victims, and that heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions." 659 P.2d at 10. Because the statute is in the disjunctive, if either "cruelty" or "heinous or depraved" is shown, the aggravating circumstance applies. *Id.*

1. Cruelty.

The "cruelty" prong is satisfied only when the prosecution proves beyond a reasonable doubt that the victim consciously suffered mental anguish or physical pain prior to death. *State v. Gretzler*, 659 P.2d at 10. This requirement for "cruelty" has been consistently applied.[15]

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[15] *State v. Vickers*, 768 P.2d 1177 (Ariz. 1989) (cruelty established where the defendant threw flaming liquid upon the

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Only a few months after *Gretzler*, the Arizona Supreme Court held that, for the "cruelty" aggravating circumstance to exist, the defendant must either intend to inflict mental anguish or physical pain, or reasonably foresee that he will inflict it. *State v. Adamson*, 665 P.2d 972, 988 (Ariz.), *cert. denied*, 464 U.S. 865 (1983). There has been no post-*Adamson* case where the aggravating circumstance of cruelty has been sustained without evidence that the defendant either intended to inflict mental anguish or physical pain, or should have reasonably foreseen that he would do so. *State v. Smith*, 707 P.2d at 302; *see also Adamson v. Ricketts*, 865 F.2d at 1057 (no post-*Adamson* case has abandoned the cruelty test) (Brunetti, Cir. J. dissenting). (For further explanation of all Arizona cases applying "cruelty," see Appendix C.)

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conscious victim, who ran around his cell in vain trying to extinguish the flames until he died); *State v. Beaty*, 762 P.2d at 524, 529 (mental anguish established where the terrified victim vomited while the defendant held his hand over her mouth prior to raping and murdering her); *State v. LaGrand*, 734 P.2d 563, 578-79 (Ariz.), *cert. denied*, 484 U.S. 872 (1987) (mental anguish and physical pain demonstrated where the defendant bound, gagged, and threatened the bank manager with death, then inflicted 24 stab wounds with a letter opener); *State v. Castaneda*, 724 P.2d 1, 12 (Ariz. 1986) (mental anguish and physical pain established by proof that the defendant repeatedly sodomized a 12-year-old boy, drove him to the desert, forced him to remove his clothes, then stabbed him four times in the chest as he pled for his life, leaving him writhing in pain on a red ant hill); *State v. Correll*, 715 P.2d at 733 (mental anguish proven by facts that conscious victims were uncertain concerning their ultimate fate as defendant drove them into the desert).

Petitioner objects to the application of the cruelty circumstance in his case based on the assertion that, in other cases where other defendants caused their victims to suffer mental anguish, Arizona courts "did not find" the cruelty circumstance. (Petitioner's brief at 46 n.38.) A review of petitioner's cases clearly demonstrates that some of those cases differ procedurally from petitioner's case. In *State v. Rockwell*, at the sentencing hearing, the state requested that the trial court find three aggravating factors and "cruelty" was not one of these. 775 P.2d at 1078. The trial court had no authority to find aggravation not requested by the state. *State v. Murphy*, 555 P.2d 1110, 1112 (Ariz. 1976). Therefore, the Arizona court did not find the murder to be "cruel," because the court was procedurally barred from doing so. This same procedural preclusion is found in some of petitioner's other cases. *State v. Rankovich*, 765 P.2d 518, 519 (Ariz. 1988) (state stipulated before trial that it would not seek the death penalty); *State v. McGuire*, 638 P.2d 1339 (Ariz. 1981) (penalty imposed pursuant to a plea agreement).

Likewise, in some of the other cases cited by petitioner, the opinions do not indicate whether the state sought the cruelty factor; whether the trial court found the cruelty factor, but also found that the mitigation outweighed the aggravation; or whether the trial court found that the state failed to prove the existence of conscious suffering. *State v. Carr*, 743 P.2d 1386 (Ariz. 1987); *State v. Schrock*, 719 P.2d 1049 (Ariz. 1986); *State v. Vaughn*, 708 P.2d 453 (Ariz. 1985); *State v. Nash*, 694 P.2d 222 (Ariz.), *cert. denied*, 471 U.S. 1143 (1985); *State v. Cruz-Mata*, 674 P.2d 1368 (Ariz. 1983); *State v. Ring*, 641 P.2d 862 (Ariz. 1982); *State v. Rhymes*, 628 P.2d 939 (Ariz. 1981); *State v. Watkins*, 614 P.2d 835 (Ariz. 1980); *State v. Austin*, 603 P.2d 502 (Ariz. 1979), *cert. denied*, 446 U.S. 911 (1980);

State v. Ferguson, 579 P.2d 559 (Ariz. 1978); *State v. Cookus*, 563 P.2d 898 (Ariz. 1977). Therefore, petitioner's contention that Arizona courts "did not find" cruelty in these cases cannot be supported.

Of the cases cited by petitioner to show inconsistency, only *State v. Poland*, *State v. Lujan*, and *State v. Watson*, address the findings of cruelty, and in each of these cases the court correctly applied the cruelty test set forth above. In *Poland*, the Arizona Supreme Court held that the state had failed to prove beyond a reasonable doubt that the victims suffered mental anguish because "we know nothing of the circumstances under which the [victims] were held hostage." 645 P.2d at 800. The court did not find that mental suffering could not be the basis of cruelty; it found only that, in *Poland*, the evidence was inconclusive that the victims did consciously suffer. *See also State v. Poland*, 698 P.2d 183 (court reaffirms prior holding that state presented insufficient evidence of cruelty).

In the pre-*Gretzler* case of *Watson*, the victim was shot in the back four times, and there is no indication that the victim saw the defendant or knew he was about to die. 586 P.2d at 1260. Like *Poland*, the evidence in *Watson* was inconclusive whether the victim suffered mental anguish. The Arizona Supreme Court reached the same conclusion about lack of proof of mental suffering in *Lujan*. 604 P.2d at 636. There is nothing in these opinions that would indicate the Arizona Supreme Court has abandoned its "cruelty" test, or applied it in an inconsistent manner.

2. Heinous or depraved.

Contrasted with cruelty, the elements of heinousness and depravity focus upon the defendant's attitude and mental state, as reflected in his words or actions, at or

near the time of the murder. *State v. Ceja*, 612 P.2d 491, 495 (Ariz. 1980). The Arizona Supreme Court has held that a defendant's actions must fall into one of the following categories to constitute the aggravating circumstance: (1) relishing in the murder; (2) infliction of gratuitous violence upon the victim above that which was necessary to complete the object of the crime; (3) needless mutilation of the victim; (4) senseless crime; or (5) helpless victim. *State v. Gretzler*, 659 P.2d at 11. Neither of the last two elements, in isolation, will lead to the application of the circumstance. 659 P.2d at 10-12. The Arizona Supreme Court has consistently applied these factors.[16] (For further explanation of all Arizona cases applying "heinous or depraved," see Appendix C.)

Petitioner objects to the application of the "heinous or depraved" circumstance in his case based on the assertion that in other cases where other defendants boasted about their crimes, Arizona courts "did not find" the

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[16] *State v. LaGrand*, 734 P.2d at 578-79 (infliction of gratuitous violence and needless mutilation, plus the senselessness of the killing and the helplessness of the victim); *State v. Wallace*, 728 P.2d at 236-38 (infliction of gratuitous violence after the victims had collapsed; decision to use a baseball bat and pipe wrench in spite of possession of a loaded revolver, and the total senselessness of killing three people he had lived with for 2 years as a family); *State v. Rossi*, 706 P.2d 371, 377 (Ariz. 1985) (defendant used special bullets designed to make bigger holes, subsequently bragged about the murder, and gave a friend three spent bullets as souvenirs); *State v. Lambright*, 673 P.2d 1, 13-14 (Ariz. 1983), *cert. denied*, 469 U.S. 892 (1984) (staging a victory celebration in which killers sang "We Are the Champions" evidenced relishing in the crime); *State v. Zaragoza*, 659 P.2d 22, 28 (Ariz.), *cert. denied*, 462 U.S. 1124 (1983) (murder of 78-year-old mentally impaired woman after rape and robbery was gratuitous violence as defendant could have accomplished criminal goals without killing her).

heinous or depraved circumstance. (Petitioner's brief at 47 n.39.) In *State v. Lamb*, the state did not seek the death penalty, thereby precluding the trial court from finding any aggravating circumstances. 690 P.2d 764, 774 (Ariz. 1984). In other cases cited by petitioner, the opinions do not indicate whether the state sought the aggravating circumstance; whether the trial court found the circumstance, but found mitigation to outweigh the aggravation; or whether the court found the state presented insufficient evidence to prove the existence of the circumstance. *State v. Tucker*, 759 P.2d 579 (Ariz. 1988); *State v. Williams*, 650 P.2d 1202 (Ariz. 1982); *State v. Hensley*, 691 P.2d 689 (Ariz. 1984). Of the cases cited by petitioner for inconsistent application, only *State v. Graham*, 660 P.2d 460 (Ariz. 1983), and *State v. Madsen*, 609 P.2d 1046 (Ariz. 1980), address the application of the aggravating circumstance of "heinous or depraved," and a reading of those cases does not show inconsistent application.

In *Graham*, the Arizona Supreme Court, in applying the "heinous or depraved" test, found "no compelling evidence" that Graham had the requisite mental attitude as reflected by his words or actions. 660 P.2d at 463. The only evidence presented was a statement by a codefendant that Graham stated the victim "squealed like a rabbit" when Graham shot him. *Id.* Graham denied making the statement. *Id.* Even if Graham had made the statement, the Arizona Supreme Court was not convinced beyond a reasonable doubt that Graham relished in the crime, given Graham's impaired mental condition. *Id.*[17]

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[17] The Arizona Supreme Court specifically addressed *Graham* in petitioner's appeal. *State v. Walton*, 769 P.2d at 1033. The court noted that the statement that the victim "squealed like a rabbit" could support a finding of "depravity," but did not in *Graham* based on other evidence in the record. *Id.*

In *Madsen*, a pre-*Gretzler* decision, the trial court found the crime to be depraved based on the deliberate nature and planning of the murder. The Arizona Supreme Court reversed, holding such evidence went to premeditation, and did not set *Madsen* apart from any other premeditated homicide. 609 P.2d at 1052. There is nothing in the opinion that would indicate that the state sought the finding of depravity based on Madsen's "boasting." The court reaffirmed the holding of *Madsen* in *State v. Gretzler*, 659 P.2d at 12.

A review of the cases cited by petitioner does not indicate that the Arizona Supreme Court has abandoned its limiting definition, or that it has inconsistently applied the depravity aggravating circumstance. The Arizona Supreme Court has defined the circumstance to satisfy this Court's directives in *Godfrey* and *Maynard*.

C. The circumstance was correctly applied to petitioner.

In the Arizona Supreme Court, petitioner did not dispute that the trial court applied the above-cited standards to him, but claimed that the facts as presented did not constitute the "heinous, cruel or depraved circumstance." (Opening Brief in Arizona Supreme Court at 39-45.) The facts clearly support the findings of the Arizona Supreme Court. It is without question that the victim suffered an excruciatingly "cruel" death. Petitioner and his codefendants accosted and robbed Powell in Tucson. (J.A. at 18-19.) Powell was ordered to get into his own car and forced to ride out in the desert to a remote location known as Gates Pass. (J.A. at 19-20.) Powell pled with his abductors to spare him and promised he would not tell anyone. (J.A. at 22-23.) Upon arrival at Gates Pass, Powell was placed on the ground while his abductors

debated his fate. (J.A. at 23-24.) Finally, codefendant Hoover stated that he did not care what petitioner did with Powell, "just hurry." (J.A. at 24.) Petitioner then told the codefendants to turn up the radio. (J.A. at 24-25.) Thereafter, petitioner marched Powell into the desert, placed him on the ground, put his boot on the back of Powell's neck, placed his gun at the back of Powell's head, and shot the young Marine. (J.A. at 15, 28, 31.)

Petitioner's counsel takes issue with these facts, claiming that there is no evidentiary basis upon which to conclude that Powell "expressed fear" or "begged for his life to Petitioner, or anyone, at that time, or anytime." (Petitioner's brief at 45 n.35, 46 n.36.) However, the words of petitioner during the taped interview upon arrest refute this contention:

> All that I remember is the guy [Powell] was, the guy told Rob, he goes, ***'don't hurt me, I won't tell anybody, take the car and leave.'***

(Exhibit 31, admitted 12/15/86.) A plain inference from this statement, and from the testimony from codefendant Ramsey that Powell appeared scared, is that Powell was fearful and begged for his life. Thus, the findings of the court were not "unprincipled or arbitrary" and are supported by the record. *Barclay v. Florida*, 463 U.S. at 947. The mental anguish that Powell must have experienced is comparable to that described by Justice White in his dissent in *Godfrey*, where he discussed the mental anguish that a murder victim must suffer when he becomes aware of his impending death.

> What terror must have run through [his] veins as [he] . . . came to terms with the imminence of [his] own [demise]. Was this not torture? And if this was not torture, can it honestly be said that petitioner did not exhibit a 'depravity of mind'

> in carrying out this cruel drama to its mischievous and murderous conclusion?

446 U.S. at 451 (White, J. dissenting). The Arizona Supreme Court did not err.

CONCLUSION

Respondent prays that this Court will affirm the decision of the Arizona Supreme Court on the issues presented.

Respectfully submitted,

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APPENDICES

APPENDIX A

Those states in which aggravating circumstances are determined at the penalty phase:

Ala. Code § 13A-5-49
Ariz.Rev.Stat.Ann. § 13-703(F)
Ark.Stat.Ann. § 41-1303
Cal. Penal Code § 190.2
Colo.Rev.Stat. § 16-11-103(6)
Conn.Gen.Stat. § 53A-46A(h)
Del. Code Ann. § 4209
Fla.Stat. § 921.141(5)
Ga. Code Ann. § 17-10-30(b)
Idaho Code § 19-2515(g)
Ill.Rev.Stat. Ch. 38, Para. 9-1(b)
Ind. Code § 35-50-2-9(b)
Ky.Rev.Stat. § 532.025(2)(A)
La. Code Crim. Pro. Art. 905.4
Md. Code Ann. Art. 27, § 413(d)
Ms. Code Ann. § 99-19-101(5)
Mo.Rev.Stat. § 565.032(2)
Mont. Code Ann. § 46-18-303
Neb.Rev.Stat. § 29-2523(1)
Nev.Rev.Stat. § 200.033
N.H.Rev.Stat.Ann. § 630: 5(II)(A)
N.J.Rev.Stat. § 2C: 11-3c(4)
N.M.Stat.Ann. § 31-20A-5
N.C.Gen.Stat. § 15A-2000(e)
Okla.Stat. § 701.12
Pa.Cons.Stat. 42 § 9711(d)
S.C. Code Ann. § 16-3-20(C)(A)
S.D. Codified Laws Ann. § 23A-27A-1
Tenn. Code Ann. § 39-2-203(i)
Wyo.Stat. § 6-2-102(h)

APPENDIX B

Inmates Incarcerated for Homicide
Under Arizona's New Criminal Code,*
October 30, 1989**

Classification	*Number of Inmates*	
§ 13-1105 (First degree)	356	
§ 13-1104 (Second degree)	353	
§ 13-1103 (Manslaughter)	290	
§ 13-1102 (Negligent Homicide)	44	
	1043	Total

Of the 356 inmates incarcerated for first degree murder under the new criminal code, 66 are under a death sentence.***

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* Arizona Revised Statutes Annotated §§ 13-1101 through 13-1105, effective October 1, 1978

** Source: Arizona Department of Corrections, Planning Statistics

*** There are an additional 16 death row inmates who were convicted of crimes occurring prior to the October 1, 1978 effective date of the new code and therefore are not included in this appendix. [Source: Office of the Arizona Attorney General, *Profiles of Death Row Inmates Arizona State Prison* (Rev. Feb. 1, 1989).]

APPENDIX C

KEY:

a. Court did not distinguish between "cruelty" and "heinous or depraved"
b. Appellate court did not address facts to support trial court's findings
c. Appellate court did not specifically list Gretzler factors
d. Facts to support circumstance not found by trial court
e. Gretzler factors indicating heinousness or depravity
   1. Relishing of the murder
   2. Infliction of gratuitous violence above that necessary to complete objectives of the crime
   3. Mutilation of the corpse
   4. Senselessness of the crime
   5. Helplessness of the victim

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(1) State v. Blazak 560 P.2d 54 (1977)	No	[b]Yes 560 P.2d at 61 n.3	[b]Yes 560 P.2d at 61 n.3	Pre-Gretzler	Knapp, 562 P.2d at 716 Ceja, 565 P.2d at 1278
(2) State v. Knapp 562 P.2d 704 (1977)	No	[a]Yes 562 P.2d at 716	[a]Yes 562 P.2d at 716	Pre-Gretzler	
(3) State v. Ceja 565 P.2d 1274 (1977)	No	[a]Yes 565 P.2d at 1278	[a]Yes 565 P.2d at 1278	Pre-Gretzler	Ceja, 612 P.2d at 495-96 Gretzler, 659 P.2d at 11
(4) State v. Bishop 576 P.2d 122 (1978)	No	[b]Yes 576 P.2d at 123	[b]Yes 576 P.2d at 123	Pre-Gretzler	
(5) State v. Watson 586 P.2d 1253 (1978)	No	[a]No 586 P.2d at 1260	[a]No 586 P.2d at 1260	Pre-Gretzler	
(6) State v. Brookover 601 P.2d 1322 (1979)	No	[a]No 601 P.2d at 1325	[a]No 601 P.2d at 3225	Pre-Gretzler	
(7) State v. Lujan 604 P.2d 629 (1979)	No	No 604 P.2d at 636	No 604 P.2d at 637	Pre-Gretzler	

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(8) State v. Mata 609 P.2d 48 (1980)	No	[b]Yes 609 P.2d at 57	Yes 609 P.2d at 57	Pre-Gretzler	
(9) State v. Madsen 609 P.2d 1046 (1980)	No	Not addressed	No 609 P.2d at 1052	Pre-Gretzler	
(10) State v. Steelman 612 P.2d 475 (1980)	No	[a]Yes 612 P.2d at 482	[a]Yes 612 P.2d at 482	Pre-Gretzler	
(11) State v. Ceja 612 P.2d 491 (1980)	No	No 612 P.2d at 495	Yes 612 P.2d at 495-96	Pre-Gretzler	Opinion deleted cruelty from finding in Ceja, 565 P.2d at 1278
(12) State v. Clark 616 P.2d 888 (1980)	No	No 616 P.2d at 896	Yes 616 P.2d at 896-97	Pre-Gretzler	Gretzler, 659 P.2d at 11
(13) State v. Bishop 622 P.2d 478 (1981)	No	No 622 P.2d at 481	Yes 622 P.2d at 481	Pre-Gretzler	Gretzler, 659 P.2d at 11
(14) State v. Vickers 633 P.2d 315 (1981)	No	Not addressed	Yes 633 P.2d at 324	Pre-Gretzler	Gretzler, 659 P.2d at 11
(15) State v. Tison 633 P.2d 335 (1981)	No	Yes 633 P.2d at 352	Yes 633 P.2d at 352	Pre-Gretzler	See also State v. Tison 633 P.2d 355 (1981) Gretzler, 659 P.2d at 11
(16) State v. Smith 638 P.2d 696 (1982)	No	[ab]Yes 638 P.2d at 697	[ab]Yes 638 P.2d at 697	Pre-Gretzler	Gretzler, 659 P.2d at 11
(17) State v. Ortiz 639 P.2d 1020 (1982)	Yes 639 P.2d at 1031	No 639 P.2d at 1035	Yes 639 P.2d at 1035	Pre-Gretzler	Gretzler, 659 P.2d at 11

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(18) State v. Blazak 643 P.2d 694 (1982)	No	No 643 P.2d at 700	No 643 P.2d at 700	Pre-Gretzler	Opinion deleted cruelty and depravity from finding in Blazak, 560 P.2d at 61 n.3
(19) State v. Poland 645 P.2d 784 (1982)	No	No 645 P.2d at 800	No 645 P.2d at 800	Pre-Gretzler	
(20) State v. Woratzeck 657 P.2d 865 (1983)	No	No 657 P.2d at 870	Yes 657 P.2d at 870	Pre-Gretzler	
(21) State v. Gretzler 659 P.2d 1 (1983)	Yes 659 P.2d at 9	Yes 659 P.2d at 12	Not addressed 659 P.2d at 12		
(22) State v. Zaragoza 659 P.2d 22 (1983)	Yes 659 P.2d at 27	No 659 P.2d at 28	Yes 659 P.2d at 28	[c]2, 4, 5 659 P.2d at 28	
(23) State v. Gerlaugh 659 P.2d 642 (1983)	No	[ab]Yes 659 P.2d at 642	[ab]Yes 659 P.2d at 642	b	
(24) State v. Graham 660 P.2d 460 (1983)	No	No 660 P.2d at 463	No 660 P.2d at 463–64	Not factor 1 660 P.2d at 463	Walton, 769 P.2d at 1033
(25) State v. Jeffers 661 P.2d 1105 (1983)	Yes 661 P.2d at 1131	No 661 P.2d at 1130	Yes 661 P.2d at 1130–31	1, 2 661 P.2d at 1131	
(26) State v. Gillies 662 P.2d 1007 (1983)	No	Yes 659 P.2d at 1019–20	Not addressed		
(27) State v. McDaniel 665 P.2d 70 (1983)	No	Yes 665 P.2d at 82	Not addressed		

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(28) State v. Adamson 665 P.2d 972 (1983)	No	Yes 665 P.2d at 988–89	Not addressed		
(29) State v. Richmond 666 P.2d at 57 (1983)	Yes 666 P.2d at 64–65	No 666 P.2d at 64	Yes, by minority of court 666 P.2d at 64	2,3 by minority of court 666 P.2d at 64	
(30) State v. Harding 670 P.2d 383 (1983)	Yes 670 P.2d at 398	No 670 P.2d at 399	Yes 670 P.2d at 399–40	2, 3, 5 666 P.2d at 400	
(31) State v. Lambright 673 P.2d 1 (1983)	Yes 673 P.2d at 12	Yes 673 P.2d at 13	Yes 673 P.2d at 13	1 673 P.2d at 13	
(32) State v. Smith 673 P.2d 17 (1983)	Yes 673 P.2d at 17	Yes 673 P.2d at 23	No 673 P.2d at 23–24		See Lambright, 673 P.2d 1
(33) State v. Summerlin 675 P.2d 686 (1983)	No	Yes 675 P.2d at 696	Yes 675 P.2d at 696	1, 2, 3, 4, 5 675 P.2d at 696	
(34) State v. McCall 677 P.2d at 920 (1984)	No	Yes 677 P.2d at 934	Yes 677 P.2d at 934–35	2, 3, 4 677 P.2d at 934–35	
(35) State v. Libberton 685 P.2d 1284 (1984)	No	Yes 685 P.2d at 1291	Not addressed		
(36) State v. James 685 P.2d 1293 (1984)	No	Yes 685 P.2d at 1299	Yes 685 P.2d at 1299	1, 2, 4 685 P.2d at 1299	
(37) State v. Fisher 686 P.2d 750 (1984)	No	Not addressed	Yes 686 P.2d at 775	[c]2, 4, 5 686 P.2d at 775	

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(38) State v. Chaney 686 P.2d 1265 (1984)	No	Yes 686 P.2d at 1282		[c]2, 4, 5 686 P.2d at 1282-83	
(39) State v. Harding 687 P.2d 1247 (1984)	No	Yes 687 P.2d at 1256	Not addressed		
(40) State v. Smith 687 P.2d 1265 (1984)	No	Not addressed	[d]No 687 P.2d at 1267		
(41) State v. Villafuerte 690 P.2d 42 (1984)	No	No 690 P.2d at 50	Yes 690 P.2d at 50	2, 4, 5 690 P.2d at 50	
(42) State v Gillies 690 P.2d 54 (1984)	No	Yes 690 P.2d at 67	Yes 690 P.2d at 67	2 690 P.2d at 67	
(43) State v. Gillies 691 P.2d 655 (1984)	Yes 691 P.2d at 661	Yes 691 P.2d at 660-61	Yes 691 P.2d at 661-62	[c]1, 2, 4 691 P.2d at 661-62	
(44) State v. Carriger 692 P.2d 991 (1984)	No	Yes 692 P.2d at 1009	Yes 692 P.2d at 1009	[c]2, 5 692 P.2d at 1009	
(45) State v. Poland 698 P.2d 183 (1985)	No	No 698 P.2d at 200	Not addressed		
(46) State v. Roscoe 700 P.2d 1312 (1984)	Yes 700 P.2d at 1326	Yes 700 P.2d at 1326	Yes 700 P.2d at 1326	[c]2, 4, 5 700 P.2d at 1326	
(47) State v. Martinez-Villareal 702 P.2d 670 (1985)	No	Not addressed	Yes 702 P.2d at 679-80	1, 4, 5 702 P.2d at 680	
(48) State v. Bracy 703 P.2d 464 (1985)	Yes 703 P.2d at 480	Yes 703 P.2d at 481	Yes 703 P.2d at 481-82	2, 3, 4, 5 703 P.2d at 482	

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(49) State v. Rossi 706 P.2d 371 (1985)	Yes 706 P.2d at 378	Yes 706 P.2d at 377	Yes 706 P.2d at 377-78	1, 2, 4, 5 706 P.2d at 377-78	
(50) State v. Smith 707 P.2d 289 (1985)	Yes 707 P.2d at 298	No 707 P.2d at 302	No 707 P.2d at 301-02	None found 707 P.2d at 301-02	
(51) State v. Johnson 710 P.2d 1050 (1985)	No	Not addressed	No 710 P.2d at 1055-56	4 710 P.2d at 1056	
(52) State v. Correll 715 P.2d 721 (1986)	No	Yes 715 P.2d at 733	Yes 715 P.2d at 7	4, 5 715 P.2d at 734	
(53) State v. Castaneda 724 P.2d 1 (1986)	Yes 724 P.2d at 12	Yes 724 P.2d at 12	Not addressed		
(54) State v. Wallace 728 P.2d 362 (1986)	Yes 728 P.2d at 236	No 728 P.2d at 237	Yes 728 P.2d at 237-38	2, 4 728 P.2d at 237-38	
(55) State v. La Grand 734 P.2d 563 (1987)	No	Yes 734 P.2d at 578	Yes 734 P.2d at 578-79	2, 3, 5 734 P.2d at 578-79	
(56) State v. Moormann 744 P.2d 679 (1987)	No	Yes 744 P.2d at 688	Not addressed		
(57) State v. Beaty 762 P.2d 519 (1988)	No	Yes 762 P.2d at 529	Yes 762 P.2d at 529-30	2, 4, 5 762 P.2d at 530	
(58) State v. Vickers 768 P.2d 1177 (1989)	Yes 768 P.2d at 1188	Yes 768 P.2d at 1190-91	Yes 768 P.2d at 1190-91	[c]1, 4, 5 768 P.2d at 1190-91	
(59) State v. Walton 769 P.2d 1017 (1989)	Yes 769 P.2d at 1030	Yes 769 P.2d at 1032-33	Yes 769 P.2d at 1033	1 769 P.2d at 1033	

Case	Vagueness Claim Made	Cruelty Found	Heinous and Depravity Found	Gretzler[e] Factors Present	Clarified by Supreme Court In Another Opinion
(60) State v. Fulminante 778 P.2d 602 (1989)	Yes 778 P.2d at 619	Yes 778 P.2d at 620	Yes 778 P.2d at 621	4, 5 778 P.2d at 621	
(61) State v. Marlow 1989 Ariz. Lexis 192 (1989)	Yes 1989 Ariz. Lexis 192 at 17-18	Not addressed	Yes 1989 Ariz. Lexis 192 at 17-18	[c]2 1989 Ariz. Lexis 192 at 17-18	